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THE U. N. BY-PASSES THE INTERNATIONAL COURT AS THE COUNCIL'S ADVISER, A STUDY IN CON- TRIVED FRUSTRATION

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I. FIRST THREE YEARS OF LEAGUE'S AND U. N.'s COURTS

That the United Nations' International Court of Justice, as an advisory organ, has been all but abandoned by U. N. will come as a shock to the American lawyer, legislator and layman. In many instances legal questions have been raised in the General Assembly and the Security Council concerning their jurisdiction or competence to take action. Nevertheless, the General Assembly, which has no enforcement function, has thus far referred only five questions to the Court for advisory opinions¹ and the Security Council, which wields U. N.'s enforcement powers, has invariably refused to ask the Court's opinion on any legal question, however fundamental.

At the end of the first three years of the League of Nations, its Permanent Court of International Justice had docketed thirteen new contentious cases and rendered four judgments, and had given eight advisory opinions, some on difficult and important questions.² In its first three years, the present International Court docketed and decided only one contentious case, *i. e.*, Great Britain's claim against Albania for damages in the Corfu Channel in '46 from mines and shore bat-

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1. GOODRICH AND HAMBRO, CHARTER OF THE UNITED NATIONS 130-1, 488 (2d ed., 1949); REPORTS, INTERNATIONAL COURT OF JUSTICE 65 (1948); see also notes 5, 6, 7 and 7a *infra*.

2. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-42, 779, App. No. 22 (1943); see also 1 & 2 HUDSON, WORLD COURT REPORTS (1934).

teries.³ The Court's inaugural sitting was on April 18, '46.⁴ In October '49 it received the following contentious cases, not through the agency of U. N., but through direct application by parties: On October 1, between the United Kingdom and the Norwegian Government as to the limits of the exclusive Norwegian fisheries zone; on October 17, between the French Republic and the Egyptian Government concerning the latter's treatment of certain French nationals or their property; and on October 20, between the Governments of Colombia and Peru, as to whether Colombia in January '49 had rightly granted asylum to a national of Peru whom it regarded as a political offender.⁵ The requests by the Assembly to the Court for advice in the first three-year period were as to (1) whether, on voting in the Assembly on the admission of a State to membership, a State can condition its affirmative vote on the admission of some other State or States to membership; and (2) whether the U. N. has standing to sue Members or States for reparations for injuries incurred by persons in its service.⁶ In its fourth year, on October 22, '49, the Assembly decided to ask the Court for advice on whether in the trial of Cardinal Mindszenty and in others, Hungary, Bulgaria and Rumania violated human rights and fundamental freedoms, contrary to the declaration of U. N.'s concern for the conduct of non-members in the Charter's Section 55, and also to the peace treaties between those States and the victorious allied and associated powers. On December 2, '49 the Court received the Assembly's request for an advisory opinion on whether the Council's failure to recommend a State for admission to U. N. can affect the validity of action by the General Assembly admitting such State.⁷ The Court on December 27, '49, registered the Assembly's request for an opinion on the international status of the territory of Southwest Africa *vis-a-vis* the Union of South Africa to which it was mandated under the Covenant's Article 22.^{7a} The Council and the Assembly have invariably taken the position that they are competent to decide finally any legal question, including the basic one of their own jurisdiction.⁸

3. GOODRICH AND HAMBRO, *op. cit. supra* note 1, at 61, 68. See I.C.J. YEARBOOK 1947-48, at 55-60 (preliminary); also The Corfu Channel Case, Judgment and Order, April 9, 1949.

4. GOODRICH AND HAMBRO, *op. cit. supra* note 1, at 52.

5. See I.C.J. General List, Nos. 5, 6 and 7.

6. For the first opinion, see I.C.J. YEARBOOK, *supra* note 3, at 61-4; for the second opinion, see I.C.J. REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS, 174-219.

7. For record on Hungary, etc., see General A/1023, Oct. 18, 1949 (Ad Hoc Com's report), and A/PV 234 and 235, Oct. 21 and 22, 1949 (Assembly proc'dgs adopting report). The Court registered the request Nov. 7, 1949 (Gen'l List No. 8). The Assembly's request on the admission matter is I.C.J. Gen'l List No. 9.

7a. I.C.J. General List, No. 10.

8. GOODRICH AND HAMBRO, *op. cit. supra* note 1, at 549.

Contrast this record of U. N.'s political organs to date with the understanding of U. S. A.'s statesmen when the Charter was up for ratification in the Senate. The Secretary of State had been head of the U. S. A. delegation to, and a President of, the San Francisco Conference. Expounding the Charter to the Senate Committee on Foreign Relations, he said: "As the United States becomes a party to a Charter which places justice and international law among its foundation stones, it would naturally accept and use an international court to apply international law and administer justice. . . . The International Court of Justice which the Charter establishes, has an important part to play in developing international law just as the courts of England and America have helped to form our common law."⁹ Senator Connally, Chairman of the Senate Committee and a delegate to the San Francisco Conference,¹⁰ in introducing the Bill for ratification of the Charter, referred to the new Court as "a vital and essential part of the World Organization."¹¹ Senator Warren R. Austin, sitting in the Senate Committee at a hearing on the Bill, even expressed fear lest the new Court be unable to "protect itself under the Charter against [requests for] a great volume of advisory opinions."¹² And in its favorable Report on the Bill to the Senate, the Committee said, "Your Committee recommends that the Senate accept the International Court of Justice. . . . The acceptance . . . will carry forward the tradition of the United States as a champion of judicial settlement of disputes of a legal character."¹³

Has this unlooked-for neglect of the International Court as legal adviser, especially by the Council, U. N.'s real executive organ, been according to the Charter or has there been a violation of it? Does the language bearing on the two World Courts so differ as to account for the relative disuse of the new Court; and if not, what does account for it?¹⁴

Delimitations and Overtones of this Inquiry

Neither the Covenant nor the Charter contemplates judicial review, in the American sense, of the action of a political body on the

9. Hearings before Committee on Foreign Relations on Sen. Rep. No. 5737, 79th Cong., 1st Sess. 121 (1945).

10. THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO, 1945, SELECTED DOCUMENTS (Dep't of State publ'n No. 2490, 1946) (hereafter referred to as Sel'd Doc's), p. 59.

11. H.R. Doc. No. 3922, 79th Cong., 1st Sess. 7 (1945).

12. *Hearings*, *supra* note 9, at 336.

13. H.R. EXEC. DOC. No. 8, 79th Cong., 1st Sess. 14 (1945).

14. For a useful documentary comparison of the two World Courts, see Hudson, *The Twenty-Fourth Year of the World Court*, 40 AM. J. INT'L L. 1 (1946).

motion of a party.¹⁵ So far as both documents go, there are only two ways in which a legal question could come before the World Court for its action: *first*, when the question is inherent in a dispute that the parties have brought to the Court;¹⁶ and *second*, when a political organ (say, the Council) asks the Court for an advisory opinion on a legal question involved in a problem. This inquiry touches only the second or advisory function of the World Court. This function of the judiciary as advisor to the legislative body is supported by a long line of precedents:¹⁷ it has been available to the British Parliament through the Judicial Committee Act of 1833, to parliaments of several Continental European countries through constitution or statute, and to legislatures of several North and South American States through similar authority.¹⁸

Another delimitation: The Charter creates definite fields of concern for each principal political organ. The General Assembly (Ch. IV) is to initiate studies and make recommendations to the Members or to the Security Council to promote international cooperation, etc. The Security Council (Ch's V, VI and VII) can investigate at any stage a *situation* that potentially threatens international peace, and thereafter make recommendations; and if peace is actually threatened, can organize enforcement of its orders through economic isolation of an offending State or through cooperative use of force against it. The Economic and Social Council (Ch. X) can initiate studies, make reports with recommendations about observance of "human rights and fundamental freedoms," and call international conferences on "economic, social, cultural, educational, health and related matters." These and other powers express a new ethical-political thrust of world concern for conditions necessarily existing under one flag or another that are deemed unhealthy for world peace; and they cannot be ignored while other parts of the Charter are being interpreted. The Charter obviously intended these organs *prima facie* to have reasonable latitude in a bona fide assumption of their own jurisdiction. Not until competence has been seriously challenged would a question arise about resorting to the Court for advice. On this there can be no absolutes.

15. Jessup, *The International Court of Justice and Legal Matters*, 42 ILL. L. REV. 273 (1947).

16. But see GOODRICH AND HAMBRÖ, *op. cit. supra* note 1, at 548, that one party, having accepted the Court's compulsory jurisdiction, can alone bring a legal question to the Court.

17. Borchard, *Declaratory Judgments* 71-80 (2d ed. 1941); HUDSON, *op. cit. supra* note 2, at 485; HUDSON, *Advisory Opinions of National and International Courts*, 37 HARV. L. REV. 970-1001 (1924).

18. Mass citations will be avoided. The terms *interpretation* and *construction* will be used interchangeably. Italics in quotations will be the writer's.

A political organ's recommendation might have to precede, or be issued simultaneously with, a request to the Court on the organ's competence to act. Again, an old dispute might not be adjusted through answering legal questions long overlaid.¹⁹

Americans, North and South, in considering the powers of U. N.'s Court, are inevitably swayed by the crucial event in American constitutional history, when Chief Justice Marshall for the Supreme Court in *Marbury v. Madison*²⁰ found that the Constitution empowered the Court to declare null and void an act of Congress, a decision based only on the inherent necessity for such judicial supremacy in a constitutional order.²¹ The Court declared in effect that the new government's very existence was at stake.²² The life of U. N. could ultimately depend on the status of its Court, even for giving advice that the political organs can disregard.²³ Compared with the document before Marshall, which afforded no words implying the power found by him, the Charter leaves a break of merely a hair's breadth in the circuit of meaning to be closed by the spark of inference for requiring that the Court be consulted. Elsewhere, acceptance of the constitutional principle of judicial review has been confined chiefly to large parts of the Western Hemisphere;²⁴ but it would be fortunate if in all U. N. States there could be at least an understanding of that principle and the extent of its acceptance.

In a sense the Charter aspires to be a constitution. To promote the true objects of a grant of power a constitution should receive, as

19. Gilmore, *United Nations Symposium*, 55 YALE L.J. 1061-62 (1946) (referring to the Permanent Court's advisory opinions in the Eastern Carelia and Austro-German Customs Union cases), remarks that there are issues not healthy to be brought before an international court "because they escape or transcend judicial competence." See also Hudson, *The Twenty-Sixth Year of the World Court*, 42 AM. J. INT'L L. 15-16: "In some disputes the legal relations of the parties are subordinate to the political considerations involved."

20. 1 Cranch 137 (U.S. 1803).

21. 3 BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 142 (1916); also 1 *id.* at 323.

22. 3 *id.* 114-16.

23. GOODRICH AND HAMBRO, *op. cit. supra* note 1, at 487-8. See HUDSON, *op. cit. supra* note 2, at 513, as to the League's reception of the Permanent Court's advisory opinions.

24. Referring to U.N. Members only: Powers of judicial review, about equivalent to that in the U.S.A., exist in Argentina, Bolivia, Colombia, Costa Rica, Cuba, Mexico, Nicaragua, Paraguay, Venezuela, and Haiti, all through express constitutional requirement except in Argentina (where, as in the Dominican Republic and Paraguay, the constitution is silent). There is limited review power in Canada, Chile, the Dominican Republic, El Salvador, Guatemala, Honduras, Panama and Uruguay, all by constitution, except in the Dominican Republic.

In the Eastern Hemisphere: Judicial review is extensive in Liberia; limited in Greece, Norway, Switzerland, Australia and the Union of South Africa; and non-existent in Belgium, China, Egypt, France, Great Britain, Netherlands, Russia and Turkey. See U. S. CONSTITUTION SESQUICENTENNIAL COMMISSION, *HIGH COURTS OF THE WORLD AND THEIR POWERS*, ETC. (1937); ARAGON-RIVERA, *EL PODER JUDICIAL EN LAS CONSTITUCIONES AMERICANAS* 18-21 and 38-42 (1944); Pound, *The Constitution: Its Development, Adaptability and Future*, 13 A.B.A.J. 744 (1947).

it has in the U. S. A., a fair and liberal construction.²⁵ In the main, the principles of statutory construction are followed, with implication of powers as well as restraints.²⁶ Where meaning is doubtful there can be resort to historical and contemporary conditions²⁷ including, with limitations, proceedings in constitutional conventions.²⁸

II. WORLD COURT'S STATUS UNDER COVENANT AND CHARTER

The Permanent Court's functions were created by two instruments: (a) the Covenant of 1919 authorizing the League's political branches to submit to the Members a "Statute" for a World Court! and (b) the Statute itself, which was prepared by the Council, approved by the Assembly for submission to the Members, and brought into force in 1921.²⁹ By analogy it could conveniently be called a statute.

U. N.'s World Court was created outright by Articles III and XIV of the Charter. The name "Statute," given to the part of the Charter detailing the composition, duties and procedure of the Court, is misleading;³⁰ the Charter declares (Art. 92) that it "forms an integral part of the Charter."

On paper the new Court's position is considerably stronger than that of the old.

1. The League's Court had no express status as a principal organ. U. N.'s Court is from the outset (Ch. III, Art. 7) a "principal organ" and (Ch. XIV, Art. 92), "the principal judicial organ."

2. The Charter (36.3) provides that the Security Council "should take into consideration that legal disputes should as a general rule be referred by the parties to the International Court." The Covenant was silent on this point.

3. The League Court's competence in matters arising under the Covenant rested solely on Article 36, paragraph 1, giving the Court

25. *Gibbons v. Ogden*, 9 Wheaton 1 (U.S. 1824).

26. *McCullough v. Maryland*, 4 Wheaton 316 (U.S. 1819); *United States v. Fisher*, 2 Cranch 358 (U.S. 1805).

27. *Maxwell v. Dow*, 176 U.S. 581 (1900); *Ex parte Wells*, 18 Howard 307 (U.S. 1856).

28. See *Maxwell v. Dow*, 176 U.S. 581 (1900); *Prigg v. Commonwealth of Pa.*, 16 Peters 539 (U.S. 1842); *People v. Harding*, 53 Mich. 48, 19 N.W. 155 (1884). The 1787 debates in the constitutional convention, voted secret by it, were not available to Chief Justice Marshall in 1803. James Madison's private notes on the debates, became public only after his death, nineteen years later. They disclose that judicial supremacy, irreconcilably debated, could not be dealt with in a document of compromises. See BEVERIDGE, *op. cit. supra* note 21, at 429, 452, 50-100, 100-156, *esp'ly* 115-116. HUNT & SCOTT, *THE DEBATE IN THE FEDERAL CONVENTION OF 1787, esp'ly* 49-52, 274-277, 473-475.

29. HUDSON, *op. cit. supra* note 2, at 128.

30. A too literal deference perhaps to the suggestion in Ch. VII of the Dumbarton Oaks Proposals that the United Nation's Court be created on the "basis" of the League's Statute of the Permanent Court.

jurisdiction in "all matters specially provided for in treaties or conventions in force." The Charter's Statute of the Court (36.1) states that the Court's jurisdiction includes also "all matters specially provided for in the Charter of the United Nations," a distinct gain in certitude.

4. (a) Under the Covenant (Arts. 12, 13) the Council had to wait until a *dispute* was *brought* to it. The Charter (Art. 34) enables the Security Council to *initiate* an investigation of not only a dispute but also "*any situation which might lead to international friction,*" etc.

(b) Under the Covenant (Art. 15) the Council passively received a dispute presumably when the parties had already tried arbitration or the Court, if such disposal was deemed suitable. The Charter (36.1) enables the Security Council to initiate investigation of a dispute or situation "at any stage."³¹ The Court's scope was thus potentially enlarged.

5. The League's Council under the Covenant (Art. 14) had only implied authority to refer a legal question to the Court: "The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." The Charter (Art. 96.1) expressly declares that the Security Council "may request the International Court of Justice for an advisory opinion on any legal matter."

We shall now see that, when the Charter's Articles 36.3 and 96.1 are read together, (a) the applicable juristic principles of interpretation *require* the Council to try to induce the parties to refer a dispute to the Court; (b) if it fails, those principles *require* it to ask the Court for an advisory opinion on any legal question in the dispute; and (c) even more compellingly they *require* the Council to ask for such an opinion when it is investigating a situation where only one State is before it. In other words, the meaning of *may request* in its context is not discretionary, but mandatory.

IN MOST LEGAL SYSTEMS MAY MEANS SHALL WHEN AUTHORITY IS GIVEN PUBLIC OFFICERS IN FURTHERANCE OF JUSTICE

For centuries under the Roman-Civil and the Anglo-American systems, the word *may* has been held to mean *shall* when used in connection with an act by an officer in furtherance of justice.³² In

31. Kelsen, *The Settlement of Disputes by The Security Council*, 2 INT'L L.Q. 173-213 (1948).

Rock Island County Supervisors v. United States^{32a} the statutory word *may* was given the mandatory meaning. The Court, citing early English cases, said: "Whenever the public interest or individual rights call for its exercise, the language used, though permissive in form is in fact peremptory. . . . It [the power] is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless."

In *Michaelson v. United States*,^{32b} the Court was construing a penal statute which provided that trial by the court *may* be with a jury. The Court through Justice Sutherland, citing *Rock Island County Supervisors v. United States*, said: "The intent of Congress was to give to the accused the right of trial by a jury, not merely to vest authority in the judge to call a jury at his discretion."^{33a} The decision should be partly discounted here by the Court's desire to preserve the statute's constitutionality, but this discount seems counterbalanced both by the deep stream of unqualified precedent in the Court and by the established principle that where a treaty fairly admits of two constructions the more liberal is preferable.^{33b}

The mandatory meaning for *may request* in Article 96.1 has further support from five chief considerations:

The Council's new power to initiate the clearing-up of a mere situation reenforces its presumptive duty to refer basic legal questions to the Court

The Covenant as amended in 1924 provided that before coming to the Council, disputants should try arbitration or the Court, if such method was suitable to the character of the dispute. By that time a dispute might have become too involved for disposal by the Court's determination of legal issues. The framers of the Covenant thus had

32a. Roman Law has affected most legal systems: see BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE*, I 72-94; II 635-6, 870-1 (2d ed. 1901); YNTEMA, *Roman Law as the Basis for Comparative Law*, A CENTURY OF PROGRESS 346-403 (1937). In Latin *may's* equivalent for optional authority is *auctoritas* or *potestas* (posse, potest). for their mandatory meaning, in Civil (Roman) Law, see Calvinus (Kahl) I MAGNUM LEXICON JURIDICUM 160 (1759) based on Roman, Canon and Feudal Laws, II *id.* at 275-6; Heuman, 1 HANDELEXICON ZU DEM QUELLEN DES RÖMISCHEN RECHTS 43-4, 40 (1879); Monier *Petite Vocabulaire Romain*, LUCERNA JURIS 47 (1942); LEBRIJA, LEXICO DE DERECHO CIVIL 97 (1944); 2 DWARRIS, STATUTES 712 (1831); 2 STROUD, THE JUDICIAL DICTIONARY 1174-1176 (2d ed. 1903); 26 WORDS AND PHRASES 771-864 (1940). In 1850, in *Mason v. Fearson*, 9 Howard 248 (U.S. 1850) the Supreme Court, assimilating the phrase *it shall be lawful to may*, applied the ancient mandatory meaning to a statute that gave authority to public officers.

32b. 71 U.S. 435, 446-447 (1867).

32c. 266 U.S. 42 (1924).

33a. *Id.* at 70.

33b. See *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Jordan v. Tashiro* 278 U.S. 123 (1928); *Asakura v. City of Seattle*, 265 U.S. 332 (1924); 2 HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1468-1515 (2d ed. 1945).

special reasons for giving to the Council by implication the option whether or not to submit a legal question to the Court. But the Charter has no such requirement. U. N. disputants can go straight to the Council; and U. N. can without invitation step in even at the inception of a "situation" when any legal question would presumably stand out more clearly for judicial decision. Here sound policy suggests that the Council should not have optional discretion to submit a legal question to the Court, but should be under the presumptive duty or even direct mandate to do so. Other features of the Charter also suggest this.

The Court's sole express authority finally to decide on its own competence implies that such authority was withheld from the political organs

Another ground for construing *may request* as mandatory: Chapter II (36.6) of the Charter's Statute of the Court which provides: "In the event of a dispute as to whether the court has jurisdiction, the matter shall be settled by the decision of the court." The Charter is wholly silent on whether the Assembly or the Council can finally determine its own competence. As we shall see below, in most legal systems there is a presumption against a forum's self-serving final decision that it has competence.³⁴ Under the League Covenant (Statute, Art. 36), there was the same express vesting in the Court alone of power to determine its jurisdiction, without corresponding express power in Assembly or Council; and the League's Council seems always to have referred the question of its competence, when seriously raised, to the Court.³⁵

Juristically, such selective vesting in the Court alone of power to determine its own jurisdiction means that the other organs were not meant to have that power. The Roman Law principle *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), calls for this conclusion.³⁶

Suppose we supplied by inference alone the power in the political bodies to make such final decision. The strange result would then follow that by wholly induced inference (without any words to interpret), the two political organs would have authority that U. N.'s principal judicial organ could exercise only through express empower-

34. See text *infra*, at note 38 *et seq.*

35. HUDSON, *op. cit. supra* note 2, at 523-4.

36. See HALKERTON, COLLECTION OF LATIN MAXIMS 45 (1923); WHARTON, LEGAL MAXIMS 71, 72 (3d ed. 1903); BROWN, A SELECTION OF LEGAL MAXIMS 443-54 (10th ed. 1930); DWARRIS, *op. cit. supra* note 32 at 767: "Where an act of Parliament gives authority to 'one' person expressly all others are excluded" (citing 11 Rep. 59, 64); see *Tucker v. Alexandroff*, 183 U.S. 424, 436 (1902) (construing a treaty).

ing words. Would not such a result be glaringly contrary to the *expressio unius* rule, especially when the document is creating a constitutional arrangement?

The Charter specially indicates the Council's duty to seek advice on its competence when a State's dispute is with domestic dissidents

Take a case where (a) the Security Council is intervening in a controversy between a Member State and resident dissidents; (b) the situation if continued is likely to endanger international peace; and (c) the State challenges the Council's competence under Article 2, paragraph 7, on the ground that the matter is its own domestic concern. After declaring that each Member State is sovereign, the Charter (2.1) warns: "Nothing contained in this Charter shall authorize the United Nations to intervene in matters which are essentially within the jurisdiction of any State." In such a situation, when the Member State so challenges the Council's competence, has the Council authority finally to decide in favor of its own jurisdiction, to issue recommendations and orders to the State, and to apply force for compliance? Under 96.1, in the case of a dispute *between Member States*, the Council's request to the Court "for an advisory opinion on any legal question" is not made dependent on whether international peace may be endangered. So we have the question: If the situation being dealt with potentially endangers international peace, could the framers of the Charter have intended to give the Council more authority when a State's controversy is with domestic dissidents than when it is with another Member State? Mr. Evatt, Australian delegate at San Francisco, in a memorandum in committee, declared that were the Charter to permit the Council, when pursuing only its conciliatory function (Ch. VI), to intervene in a State's domestic affairs on the Council's own finding that a dispute constitutes a threat to peace, this would be "almost an invitation to use or threaten force in any dispute arising out of a matter of domestic jurisdiction in the hope of inducing the Security Council to extort concessions from the State that is threatened."³⁷ An interpretation of *may request* as giving the Council more authority to decide its own competence in such a domestic disturbance than in an inter-State dispute when there is only a potential threat to peace, would mean that on a thread of implication easily subject to manipulation, as Mr. Evatt pointed out, the Council could readily by-pass the Court and render futile the safeguarding domestic jurisdiction limitation of Article 2. To put it another way: can *may request*

37. 14 U.N. CONF. DOC. 436-40 (1945).

reasonably be interpreted to mean that, once the Council has found peace to be directly or even contingently endangered by a State's domestic problem, its intervention will continue to be sanctioned throughout quiet periods when the question of its competence could easily be referred to the Court? If so, Article 2, paragraph 1's basic principle, "the sovereign equality of all its Members," would be set at naught by allowing *may* to be interpreted literally, when high judicial authority, as shown above, has construed it as mandatory in contexts far less compelling.

The Council's presumptive duty to request an advisory opinion is re-enforced when the legal question could not otherwise reach the Court

There is another special reason for construing *may* as *shall* when a State in a controversy with resident dissidents is pleading domestic jurisdiction: If two Member States are in controversy before the Security Council and one pleads domestic jurisdiction, Article 36, paragraph 3 affords the natural way for the competence question to be jointly referred to the Court, *i. e.*, the Council's recommendation to the parties. But when the dispute is between a State and domestic dissidents, the Charter has a vacuum. In the first place, under Article 35, only States can be parties before the Security Council for receiving from it a recommendation that the case be referred to the Court. Secondly, Article 34, paragraph 1 of the Statute of the Court declares: "Only States or members of the United Nations may be parties in cases before the Court." As the Charter does not afford any other way for the legal question to reach the Court in furtherance of justice, its framers must have intended the Council to be under mandate to request the Court's opinion.

The presumption against a forum's decision on its own competence

In construing a document, a fundamental concern of the courts is that, as construed, it shall make sense.³⁸ The Charter declares (Art. 36 of the Statute): "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties or conventions in force." In two of the three classes thus placed within the Court's jurisdiction two or more States can certainly submit the matter to the

38. *Sullivan v. Kidd*, 354 U.S. 433, 439 (1920) ("that all parts of a treaty are to receive a reasonable construction with a view to giving a fair operation to the whole. Moore, *International Law Digest*, Vol. 5, 249").

Court. The issue of the Council's competence on the score of a State's domestic concern when that question arises in a dispute between States belongs in the third class of matters in the Court's jurisdiction because it is specially provided for in the Charter; but when a controversy involves only a State and its domestic dissidents it is inherently impossible for it to be referred to the Court "by the parties," as there is only one. It can reach the Court only if the Council requests an advisory opinion. But the Council, by its intervention, has already *prima facie* asserted its own competence; and, naturally, the longer it acts, the more fixed does that assertion become. If the Council has the free option not to ask the Court for legal advice on its competence, would it ever ask? Would it make sense for the Charter expressly to place this definite class of questions in the Court's jurisdiction and then to render it practically certain that they will never reach the Court?

Under most Roman-Civil and Anglo-American systems, parties are safeguarded when a forum declares its own competence. Such decisions by lower courts are subject to appeal.³⁹ Assumption of jurisdiction cannot confer authority where it does not exist,⁴⁰ and a court is bound to take notice of the limits of its own authority.⁴¹ For the Charter to provide that the question raised when a State challenges the Council's competence is *ipso facto* in the Court's jurisdiction, and then not to afford any way for the question to reach the Court except through the optional grace of the Council itself, would be contrary to the principles, *first*, that a forum's self-serving decision on the issue of its own jurisdiction is presumptively subject to question, and *second*, that a statute must if possible be construed as a logical structure of ideas. The accepted standards for interpreting treaties suggest that if the framers of the Charter had in mind creating a situation so anomalous, they would have said so by expressly vesting in the political bodies as they did in the Court the power to be final judges of their own competence.

39. *Stoll v. Gottlieb*, 305 U. S. 165 (1938); *Rex v. Stock*, 8 Adolphus and Ellis 405 (1838); *Rex v. Shoreditch Assessment Com'tee*, 2 K.B. 859 (1910); KLEIN AND ENGEL, *DER ZIVILPROZESS OESTERREICHS* 121-133 (1927); I GLASSON AND TISSIER, *TRAITÉ THÉORIQUE ET PRATIQUE D'ORGANISATION JUDICIAIRE, LE COMPÉTENCE ET DE PROCEDURE CIVILE* 673 (1925-9); *id.* Vol. II at 236, Vol. III at 450, 481; I GOMEZ ORBANEJA AND HERCE QUEMADA, *DERECHO PROCESAL*, 143 *et seq.* (1946).

40. *Brougham v. Oceanic Steam-Navigation Co.*, 205 Fed. 857 (2d Cir. 1913); *Reeves v. Buttler*, *Gilberts Chancery* 195 (1726); *Rorke v. Errington*, 7 H.L. Cas. 617 (1859); *Cowley v. Cowley*, App. Cas. 450 (1901). Indeed under *London Corp'n v. Cox*, L.R. 2 H.L. 239 (1867), the plaintiff is liable for execution of process from an inferior court acting beyond its jurisdiction, and the judge or court officer also if he knew of the defect.

41. *Reid v. United States*, 211 U.S. 529 (1909).

III. ADMISSIBILITY AND POSSIBLE EFFECT OF THE SAN FRANCISCO CONFERENCE PROCEEDINGS IN CONSTRUING THE CHARTER

The role of "preparatory work" in interpretation

So the Charter's language alone seems to require a political organ to refer legal questions, including that of its own competence, to the Court. Opposed to this interpretation there is at first sight a serious reason (which on analysis may prove unsound), for giving to *may request* its colloquial, optional meaning. That was the view of the Legal Adviser to the Department of State, Green H. Hackworth, when he appeared before the Senate Foreign Relations Committee urging ratification and stated: "Your view, Senator, is precisely in accord with the view of the Technical Committee that prepared the draft, namely, first, that it should be discretionary with the Council and the Assembly to request an opinion, and secondly, that it should be discretionary with the Court to give or not to give an opinion."⁴²

In the United States, general rules followed in the interpretation of private contracts are applied in construing a treaty.⁴³ If a meaning is doubtful or ambiguous, resort may be had to preliminary negotiations,⁴⁴ and even to diplomatic correspondence subsequent to the treaty.⁴⁵

There is considerable literature on the admissibility and value of "preparatory work" or what is called "*travaux préparatoires*" in the interpretation of treaties. Professor Hudson has dealt with this from the viewpoint of the Permanent Court in his treatise on that body.⁴⁶ Noting that the French term applies to material other than preliminary drafts, he points out that the Permanent Court in one case expressed a willingness to study advance instructions to representatives composing a conference of ambassadors, and that usually preparatory work is *admitted* without question; that it is resorted to when the text is not sufficiently clear; and even by scrutiny of preliminary drafts "to buttress the conclusions which have been reached independently."⁴⁷ No matter for what purpose or by what body the phrase *may request* might come to be interpreted, it seems that because of the conflict between the ordinary optional meaning of *may* in Article 96.1 and the authority for its being read in its context as *shall*, the San Francisco proceedings

42. *Hearings*, *supra* note 9, at 336.

43. *Sullivan v. Kidd*, 254 U.S. 433 (1920).

44. *Nielsen v. Johnson*, 279 U.S. 47 (1929).

45. *Terrace v. Thompson*, 263 U.S. 197, 223 (1923); 2 HYDE, *op. cit. supra* note 33, at 1482.

46. HUDSON, *op. cit. supra* note 2, at 652, 653, 654.

47. *Id.* at 653; 2 HYDE, *op. cit. supra* note 33, at 1482-3; Jessup, *Modernization of the Law of International Contractual Relationships*, 41 AM. J. INT'L L. 378, 391 (April 1947).

would at least be appropriately admitted in evidence. We shall consider later what force would be allowed them.

Some preparatory work before San Francisco

There was preparatory work on the Charter previous to San Francisco that would be admissible on the same principle as were preliminary instructions to ambassadors just mentioned.

Soviet Russia had a major part in initiating the United Nations' organization. In the Atlantic Charter (Aug. 14, '41) President Roosevelt and Mr. Churchill had declared that disarmament is essential "pending the establishment of a wider and permanent system of general security." On December 2, '41 when Stalin and Molotov met with General Sikorski, President of the Council of Ministers of Poland, to discuss future relations, they announced: "After the victorious war . . . the task of the Allied Governments will be the securing of permanent and just peace. This can be achieved only through a new organization of international relations, based on the unification of democratic nations in a permanent union." Promptly the U. K.'s Foreign Minister Eden went to Moscow, and a joint British-Soviet promotional communique was issued December 29, '41.⁴⁸

At first sight Russia's interest in joining a world organization with bourgeois States seems inconsistent with Lenin's governing principle often repeated by Stalin: "The existence of the Soviet Republic side by side with the imperialist States for a long time is unthinkable. In the end either one or the other will conquer."⁴⁹ But the Soviet Union's interest in creating an international organization is made more understandable through other highest level Soviet policy declarations recently translated for the world's public. In the 11th edition ('45) of *Voprosy*, Stalin's treatise on Soviet political strategy, he deals with the revolutionary use of compromise and reform: "In revolutionary tactics under a bourgeois regime, reform naturally becomes an instrument for disintegrating this regime, an instrument for strengthening revolution. . . . The revolutionary accepts reform in order to use it as a means of meshing the legal work with the illegal (underground) work, in order to use it as a cover for the strengthening of the illegal work which aims at revolutionary preparation of the masses for the overthrow of the bourgeoisie."⁵⁰

The reason for Russia's initiating, and thereby obtaining leadership in, the United Nations appears still more clearly in Stalin's in-

48. Hazard, *Soviet Union and the United Nations*, 55 YALE L.J., 1016 (1946).

49. "Historicus," *Stalin on Revolution*, 27 FOREIGN AFFAIRS 175, 204 (1949).

50. *Id.* at 197; Chakste, *Soviet Concepts of the State, International Law and Sovereignty*, 43 AM. J. INT'L L. 21 (Jan. 1949).

struction on political strategy, written in 1921 and first published in 1947: that sound tactics mean "profiting by discord and every kind of confusion in the camp of the adversary,"⁵¹ and by his further declaration that the Soviet Union is to be a base for "*linking the proletariat of the west with the movements for national liberation from imperialism in the east.*" In the same vein Stalin wrote in 1927: "We cannot forget the saying of Lenin to the effect that a great deal in the matter of our construction depends on whether we succeed in *delaying war with the capitalist countries*, which is inevitable but which may be delayed either until proletarian revolution ripens in Europe, or *until the colonial revolutions come fully to a head*, or, finally until the capitalists fight among themselves over division of the colonies. Therefore, the maintenance of peaceful relations with the capitalist countries is an obligatory task for us."⁵² Stalin's strategic doctrine of contriving colonial liberation movements was emphasized at the San Francisco Conference by Mr. Molotov, then the Soviet Union's Peoples' Commissar for Foreign Affairs, when in a speech delivered in Russian, he praised the prospective Charter because its purposes would appeal to the populations of colonies and mandated territories.⁵³ But this is ahead of our story.

Three days after the December '41 British-Soviet communique, the January 1, '42 Declaration of the United Nations was signed at Washington by twenty-six nations including the Soviet Union. It confirmed the Atlantic Charter. At Moscow on October 30, '43, the Declaration of Four Nations, signed on behalf of the U. S. S. R., U. K., U. S. A. and China, pledged that after the war their "united action . . . will be continued for the organization and maintenance of peace and security," and recognized "the necessity of establishing . . . a general international organization based on the principle of the sovereign equality of all peace-loving states." So Russia, strictly for her own announced special purposes, had a place on the bandwagon, and we can now see how she used it. The first sequel was the October 7, '44 Dumbarton Oaks Proposals by the same four nations for the form of a United Nations Charter.⁵⁴

Some preparatory work at San Francisco

The San Francisco Conference began April 26 and ended June 26, '45. It was preceded by meetings in Washington, April 9-25, of

51. "Historicus," *op. cit. supra* note 49, at 205.

52. *Id.* at 206, 207.

53. Hazard, *supra* note 48, at 1026.

54. GOODRICH AND HAMBRO, *op. cit. supra* note 1, at 569-82.

the United Nations Committee of Jurists to prepare a preliminary draft of a Statute of the Court.⁵⁵ The Chairman of this Committee was Mr. Hackworth, and its Rapporteur Professor Jules Basdevant, now respectively Judge and President of the International Court. The Rapporteur's report of April 25 did not contemplate that political organs would decide legal questions, even tentatively.⁵⁶

At San Francisco the Steering Committee⁵⁷ keyed the working bodies to specified provisions of the Dumbarton Oaks Proposals of 1944, and divided the Conference into four commissions: I, to handle Preamble Purposes and Principles through Committee I/1, and Amendment and Secretariat through Committees I/1 and I/2; II, to handle the General Assembly through four committees; III, the Security Council through four committees; and IV, Judicial Organization through two committees.⁵⁸

*Conference work concerning competence to interpret the Charter
in general*

On May 23, Committee II/2 referred to Committee IV/2 the question whether the General Assembly should have exclusive competence to interpret the Charter. In the latter on May 28, the acting Chairman (Egyptian delegate) observed that interpretation is tantamount to revision, and suggested that the interpreting body be the same as that which would amend, namely, the General Assembly. The question was referred to a new subcommittee, IV/2/B, composed of delegates from the U. K., U. S. A., Norway, Yugoslavia, Belgium and France.⁵⁹ On June 7, '45 this subcommittee rejected Belgium's motion that conflicts between organs on the interpretation of the Charter must be referred to the Court; and resolved that they must be disposed of by one of three methods; (i) reference to the Court for an advisory opinion, or (ii) submission to an *ad hoc* committee of jurists or (iii) reference to a joint conference. The subcommittee's report was approved on June 12 by Committee IV/2, of which the Chairman and Rapporteur, respectively, were delegates from Ecuador and Ethiopia.⁶⁰ No U. S. A. delegate seems to have dissented from this action.

Meanwhile, Commission I (Chairman and Rapporteur, respectively, Belgian and Philippines delegates), was considering the Court's

55. Meeting of Committee of Jurists, 14 U.N. CONF. DOC. 14, 587, 648 (1945).

56. *Id.* at 821.

57. See't'd Doc's, note 10 *supra*, at 25-6.

58. *Id.* at 16-24, for Conference personnel see *id.* at 25-65.

59. For action of Committee II/2, see 8 U.N. CONF. DOC. 389-92 (1945); for that of Committee IV/2 on June 7 see Fourteenth Meeting of Committee IV/2, Doc. No. 843, 13 U.N. CONF. DOC. 633, 645 (1945).

60. See 13 U.N. CONF. DOC. at 653, 668, 701-10 (1945).

status from another angle.⁶¹ At its June 14 meeting the Egyptian delegate moved that the opening paragraph on Purposes contain the express requirement that U. N.'s measures must be "in conformity with the principles of justice and international law." The delegate from Panama, supporting the motion, declared: "We will not maintain peace and security at the cost of justice." Opposed to the motion were a British delegate, the Rapporteur of the Commission, and a U. S. A. delegate. It was lost on a 21-21 vote.⁶²

Conference work concerning competence to interpret the Charter's domestic jurisdiction limitation

Up to now we have admitted "preparatory work" for possible use in construing the Charter on whether legal questions in general shall be referred to the Court for advisory opinions. But under both the Covenant and the Charter one type of legal issue has towered over all others, domestic jurisdiction. That issue is inevitably tied up with the Soviet Union's purpose mentioned above, of promoting "national liberation movements in Eastern colonial areas." If San Francisco "preparatory work" on the domestic jurisdiction issue is admitted for its possible aid in construing *may request* in Article 96, paragraph 1, it would (as will later be developed) prove of questionable value for construing the phrase contrary to its legal meaning.

Article 15, paragraph 8 of the Covenant provided that when the dispute is claimed by a party "to arise out of a matter which by *international law* is solely within the domestic jurisdiction of that party" and the Council so finds, it "shall make no recommendation as to its settlement." Apparently the League's Council never refused or ignored a serious request from a party to refer the domestic jurisdiction issue to the Permanent Court, or failed to accept the Court's advisory opinion.⁶³

Now note the form of the Charter's Article 2, paragraph 7: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement under Chapter VII."

61. First Meeting of Commission I, Doc. No. 1006, 6 U.N. CONF. DOC. 21-33 (1945).

62. The above-described actions by Committee IV/2 and by Commission I were after the U.S.S.R. had forced issuance of the June 7 Statement by the sponsoring powers on the veto in the Council. (See Part III, *infra*).

63. HUDSON, *op. cit. supra* note 2, at 510-22, especially at 513; see also Briggs, *The United Nations and Political Decision of Legal Questions*, PROC. AM. SOC'Y OF INT'L L. 42-53 (Apr. 1948).

Let us compare the two domestic jurisdiction paragraphs. The Covenant's express provision that international law shall be the criterion for domestic jurisdiction is absent from the Charter. In the Covenant the Council's own finding that it was not encroaching upon a State's domestic jurisdiction freed it for further action; the Charter does not have any such feature. The League's Council was presumably to request the Court's advisory opinion before making a finding, as was done when the domestic affairs question was seriously raised. The following *travaux préparatoires* at San Francisco indicate the desire of certain countries to get away from any such practice. The meeting on May 17, '45 of Committee I/1 (Chairman and Rapporteur, respectively, Ukrainian and Syrian delegates) was considering the form of the domestic jurisdiction paragraph. A delegate suggested that such an issue be referred by a U. N. political organ to the proposed Court. When another delegate challenged this view, the Chairman announced the discussion closed until receipt of a report from the drafting subcommittee, *i. e.*, Subcommittee I/1/A.⁶⁴ The subcommittee's Rapporteur in reports on June 1 and 13 recommended the form of a domestic jurisdiction paragraph to be inserted as paragraph 7 in Article 2 in exactly the form finally adopted, just quoted above. At Committee I/1's June 14 meeting, when the Subcommittee's report was being considered, the delegate from Greece moved the following amendment to Article 2: "It should be left to the International Court of Justice at the request of a party to decide whether or not such situation or dispute arises out of matters that under international law fall within the domestic jurisdiction of the State concerned." Delegates of Peru and "of many of the South American countries" supported the motion.⁶⁵ The Belgian delegate moved that the domestic jurisdiction paragraph be amended so that, like the corresponding paragraph in the Covenant, U. N. could not intervene except "in matters which . . . are according to international law exclusively (or solely) within the jurisdiction of any State."

The Committee's Chairman, Mr. Manuilsky, suggested that consideration of both motions for amendment would be greatly facilitated if Mr. J. F. Dulles of the United States delegation would explain the sense of the proposed form of the paragraph. This was, as will be seen,^{65a} a few days after the U. S. A., the U. K. and China had succumbed to pressure from Moscow on the interpretation of the

64. Eighth Meeting of Committee I/1, Doc. No. 423, 6 U.N. CONF. DOC. 310-11 (1945).

65. Seventeenth Meeting of Committee I/1, Doc. No. 1019, 6 U.N. CONF. DOC. 509 (1945).

65a. Text between notes 83-97, *infra*.

veto power in Security Council voting. According to the Rapporteur's minutes, Mr. Dulles was speaking for the five Governments then sponsoring the Dumbarton Oaks Proposals. He explained that the concept of the domestic jurisdiction paragraph had changed because of changes in the character of the Organization as visualized to date in the San Francisco Conference, especially in the function of the U. N. for eliminating the underlying causes of war.⁶⁶ Referring to the contention that domestic jurisdiction should be determined in accordance with international law (Committee minutes): "Mr. Dulles again pointed out that international law was subject to constant change and therefore escaped definition. It would in any case be difficult to define whether or not a given situation came within the domestic jurisdiction of a State. In this era the whole internal life of a country was affected by foreign conditions. He did not consider that it would be practicable to provide that the World Court determine the limitations of domestic jurisdiction or that it should be called upon to give advisory opinions since some countries would probably not accept the compulsory jurisdiction clause."⁶⁷ Opposing the Greek delegate's motion for amendment, Mr. Dulles suggested that further questions could arise in connection with other articles of Chapter 2: "Shall it be the Court or the Council? Somebody would have to determine questions such as this. The Committees of Commission IV had been studying this very type of problem, but they were not prepared to say that all matters of this kind should be referred to the International Court for settlement." Under the two-thirds rule, a vote of 17 to 14 lost the Greek amendment.

A vote was then taken on the Belgian proposal expressly to incorporate international law as the criterion for domestic jurisdiction. The Committee is reported as having approved without formal vote the draft excluding the proposed Belgian amendment.⁶⁸

Five days later, June 19, Subcommittee I/1/A's draft of the domestic jurisdiction paragraph, having been informally approved by

66. *Id.* at 508.

67. By the end of 1947 twenty-seven states had accepted compulsory jurisdiction, GOODRICH AND HAMBERO, *op. cit. supra* note 1, at 480; and five more states a year later; HUDSON, *The Twenty-Seventh Year of World Court*, 43 AM. J. INT'L L. 16 (1949). Reservations qualified some of these acceptances. *Id.* at 19; HUDSON, *The Twenty-Sixth Year of the World Court*, 42 AM. J. INT'L L. 10 (1948); HUDSON, *The Twenty-Fifth Year of the World Court*, 41 AM. J. INT'L L. 9 (1941); HYDE, *The United States Accepts the Optional Clause*, 40 AM. J. INT'L L. 778 (1946); PREUSS, *The International Court of Justice, The Senate, and Matters of Domestic Jurisdiction*, 40 AM. J. INT'L L. 720 (1946); WILCOX, *The United States Accepts Compulsory Jurisdiction*, 40 AM. J. INT'L L. 699 (1946). Some of the non-accepting states, for instance, Greece and Peru, had vainly fought in committees for a court with the required advisory function and for international law as its express criterion on the domestic jurisdictional issue.

68. 6 U.N. CONF. DOC. 509, 512 (1945).

Committee I/1, was submitted for final action by Commission I. Its minutes do not indicate any vote on the form of the domestic jurisdiction paragraph.⁶⁹

If the episode just reviewed should be used as an aid in construing *may request* in 96.1, Mr. Dulles' speech should be appraised from the viewpoints of its effect on the vote and of the merits of his argument. First, of the 14 votes against the Greek resolution in Committee I/1, at least three were presumably cast by the Russian bloc which, by its own announced over-all world strategy (in the Russian tongue and then mostly hidden from the West), was motivated by intentions wholly irrelevant to the Charter's basic purposes.⁷⁰ Four out of the remaining eleven votes recorded against the Greek resolution were therefore responsible for the decision of Committee I/1. Mr. Dulles' argument may well have swung these four pivotal votes cast by delegates presumably otherwise free to choose such status for the Court and international law under the Charter as might seem to them desirable. When Chairman Manuisky introduced Mr. Dulles to make his address just before the voting, it was hardly his purpose to promote a two-thirds vote in favor of the Greek and Belgian amendments.

Secondly, Mr. Dulles was curiously out of step with foremost legal authorities when he insisted that International Law's definition of domestic jurisdiction is too vague. The line has been clear and straight from Secretary of State Thomas Jefferson's letter of 1793 to the French Minister⁷¹ through Chief Justice Marshall's opinion of 1812 for the Supreme Court in *Schooner Exchange v. McFadden*,⁷² on down to the present time. Whether the concept has been the basis of "national jurisdiction"⁷³ or "supremacy of the territorial sovereign," or has been dealt with in connection with neutrality acts,⁷⁴ it has been subject to qualification only by the equally consistent principle that a State, by agreement or treaty, can waive or surrender its sovereignty, partly or wholly.⁷⁵

Both the negative restraint of domestic jurisdiction and the contractual act by which a State can waive that restraint were applied by the League's Permanent Court in a way wholly consistent with the long line of authority above indicated. The Permanent Court's Advisory

69. See Sel't'd Doc's, *supra* note 10, at 562.

70. See text *supra* at notes 48-53.

71. 2 MOORE, A DIGEST OF INTERNATIONAL LAW 362 (1906).

72. 7 Cranch 116 (U.S. 1812); 2 MOORE, *op. cit. supra* note 71, at 4.

73. Black Sea Treaty of Paris of 1856. 2 MOORE, *op. cit. supra* note 71, at 18.

74. 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 636 (1940) (acting Secretary of State Phillips' 1936 letter to consulates in Spain).

75. 2 HACKWORTH, *op. cit. supra* note 74, at 12; 1 HACKWORTH, *op. cit. supra* note 74, at 51; 2 MOORE, *op. cit. supra* note 71, at 19; 1 HYDE, *op. cit. supra* note 33, at 733.

Opinion No. 4 of February 7, '23 on The Tunis-Morocco Nationality Decrees dealt with the dispute between France and Great Britain as to whether the nationality decrees issued in Tunis and Morocco (French Zone) in '21 applied to British subjects.⁷⁶ France maintained that the matter was solely in its own domestic jurisdiction under Article 15, paragraph 8 of the Covenant; Great Britain that its international treaties with Tunis and Morocco before they became French protectorates rendered the matter international. The Court declared: "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations;" that nationality matters are in principle domestic but can be rendered international by treaty; if they are, however, the international law question would still remain whether the State had the right under the treaty to adopt the measure complained of, such question being beyond the scope of the reference to the Court. The Court held further that since treaties about whose interpretation the party States differed were involved, the matter was subject to international law, not domestic jurisdiction.

In Mr. Dulles' opinion the principle of domestic jurisdiction, as applied by the Court, would too narrowly restrict the broad new purposes of the United Nations. Britain's international law authority, Professor H. Lauterpacht, commenting in 1931 on the Permanent Court's opinion in the Tunis-Morocco case, said, on the contrary: "The effect of the opinion of the Court . . . is such that in the future no State will invoke with any hope of success the domestic jurisdiction clause unless the opponent openly admits that his demand is not based on international law. The Court apparently realized the sweeping implications of its opinion. It tried to limit them by stating that, in order to render the (domestic jurisdiction) exception of Article 15 (8) inapplicable, it is not enough to invoke international engagements or rules of international law, but that the Court must by a provisional examination satisfy itself that the treaties and rules thus invoked have a bearing on the dispute."⁷⁷

Commenting also on the Tunis-Morocco decision, Dr. L. Oppenheim, Whewell Professor of International Law in the University of Cambridge, said: "The Opinion of the Court demonstrates that the wider International Law extends its scope, the narrower will the reserved national domain become. Apart from the natural process of extension of that scope, a strong tendency in the same direction re-

76. 1 HUDSON, *WORLD COURT REPORTS* 145 (1934).

77. BUTLER AND MACCOBY, *THE DEVELOPMENT OF INTERNATIONAL LAW* 85 (rev. ed. 1934).

sults from the increasing practice of regulating by treaty matters which were formerly exclusively national.”⁷⁸

Professor J. Llewelyn Davies, Head, Department of Law, University College of Wales, in a paper before the Grotius Society in '46, expressed regret that the Covenant's formula for domestic jurisdiction had been abandoned in the Charter where international law is not referred to: "The meaning of the League formula had been clearly defined by the Permanent Court of International Justice and had come to be generally understood"; further, "The Permanent Court in explaining the old formula showed that the distinction was essentially a relative one depending upon the development of international relationships.”⁷⁹

Also differing from Mr. Dulles is Professor Philip C. Jessup (now Ambassador). In January '45 he wrote: "One weakness in paragraph 7 of Section A [of Ch. VIII of the Dumbarton Oaks Proposals] is that it seems to exclude judicial consideration of the issue whether a particular matter is 'by international law . . . solely within the domestic jurisdiction.' Yet no more clearly justiciable a category of issues could be conceived. The Permanent Court of International Justice made an admirable analysis of the problem in its Advisory Opinion on the French nationality decrees in Tunis and Morocco.”⁸⁰

There seems to be little support for Mr. Dulles' pessimistic appraisal of international law, or of the court decisions, with respect to domestic jurisdiction. We can now hazard an interpretation of his address and of the reaction to it in both Committee I/1 and Commission I. As indicated above in Part I, the Charter contradicts itself. It is ambivalent. While vowing it will ne'er consent to intervention in a State's domestic affairs, it consents unless the Charter's check in Article 2, paragraph 7, is seriously invoked. When Mr. Dulles spoke, the movement in the Conference for freeing U. N.'s political powers from legal restraint had carried the committees beyond the pattern of action set by Dumbarton Oaks.⁸¹ The Soviet delegation, according to Soviet official declarations quoted above, could not have been opposed to Charter features that would make for instability and confusion in

78. OPPENHEIM, *INTERNATIONAL LAW, A TREATISE* 94 (6th ed., rev. 1948).

79. 32 GROTIVS SOCIETY TRANSACTIONS 64 (1947). Confirming Professor Davies' view, see Chakste, *Justice and Law in the Charter of the United Nations*, 42 AM. J. INT'L L. 590 (1948).

80. *The Court as an Organ of the United Nations*, 23 FOR. AFFAIRS 233, 238 (1945). In 18 DEP'T STATE BULL. 259 at 266 (1948) the then Legal Adviser (now Ambassador), Ernest A. Gross, in an able monograph said that *domestic matter* is "a relative concept dependent upon the development of international relations." This suggests that the concept presents a clear legal limitation with liberal flexibility for adjusting to international arrangements. But see Note, 47 COL. L. REV. 268 (1947).

81. See GOODRICH AND HAMBRO, *op. cit. supra* note 1, at 111-12.

the U. N. The U. K. naturally dislikes constitutional judicial restraint, and may well have feared that the Court might fail to give full effect to a State's contractual waiver of its domestic jurisdiction. So it can be assumed that the U. S. A. delegation, under orders to hold the Conference together at all hazards,⁸² had reluctantly made concessions to its Big Five associates from its traditional preference for international law controls through a court, and that Mr. Dulles as diplomat was carrying through those concessions. This assumption is confirmed by the statement of Professor Henry Reiff, a member of the U. S. A. delegation's technical staff of legal experts for advising Committee IV/2. On April 23, '48, speaking at the annual meeting of the American Society of International Law, he referred to the strong opposition in the Committee from foreign experts hostile to judicial review; also to their jealous attachment "to the new powers" as part of the Security Council's autonomy, adding: "Mr. Golunsky, the Russian representative, was very eager that the unfolding of those powers, the development of those powers, should not be restricted by premature or unnecessarily frequent appeals to a court for the definition of those powers, and most of the members of the Committee felt the same way. We ourselves did not urge judicial review as such or any monopoly of review by the Court over the acts of the several coordinate organs. Some of the South American delegations suggested that, but it was evident in their suggestion that probably they were more interested in a delimitation of the authority of the Security Council than they were in setting up a doctrine of judicial review."⁸³

To smaller nations which had built high hopes for their own safety under the U. N. upon international law standards of justice, the views of the Big Five given by Mr. Dulles seemed sinister. They were alarmed by his reasons: distrust of international law and of the Court. Their reported protests in committee indicate that they feared the leaders of the victorious minority, not as self-declared men of little faith, but as representatives of great Powers bent upon license to interfere with their internal affairs.

82. See Part III and note 94, *infra*, in connection with the veto. GOODRICH AND HAMBRO, *op. cit. supra* note 1, at 17. The authors, both active participants at San Francisco, suggest the duress exerted there "since the members of the Conference, when faced with the possibility that a particular decision would be unacceptable to one of the Sponsoring Governments and might for that reason prevent it from joining the Organization [U.N.], did not find it expedient to force the issue and accept the consequences." The "Sponsoring Government" could not be other than the Soviet Union.

83. PROC. AM. SOC'Y INT'L L. 80-1 (1948). Professor Reiff's remarks dovetail into the Legal Adviser's July '45 statement about the view of the Technical Committee which prepared the draft of the Charter (see text at note 42, *supra*).

*Conference work at San Francisco concerning the formula for voting
in the Security Council*

The Charter itself counteracts the committee decisions, just reviewed above, aimed at excluding international law as the basis for the Court's decisions. The Statute of the Court, "an integral part" (Art. 92) of the Charter, provides in Article 38: "*The Court, whose function is to decide in accordance with international law* such disputes as are submitted to it, shall apply: (a) international conventions . . . (b) international custom . . . (c) the general principles of law recognized by civilized nations;" The Statute's Article 68 directs: "In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable." The Statute's express preservation of international law as guide for the Court probably accounts for what we shall now see: the Soviet Union's other attempts, by action both during and since the adoption of the Charter, to prevent the Council from requesting the Court for advisory opinions.

The gravest frustration of the Charter's purpose is due to attempted distortion of the meaning of *procedural matters* in Article 27 which governs voting in the Security Council. Indeed, this insistence upon a twisted meaning for the phrase is the chief reason why the Council has never asked the Court for advice. Chapter VI, Section C, was the one point left blank in the October 7, '44 Dumbarton Oaks Proposals; the sponsors simply noted that the question "is still under consideration."⁸⁴ To fill this blank, President Roosevelt at the February '45 Crimean Conference at Yalta proposed to Churchill and Stalin the draft of a voting formula which they accepted for insertion as Section C. Incorporated by the four sponsoring powers into their Dumbarton Oaks Proposals, Section C was later adopted by the San Francisco Conference verbatim as Article 27 of the Charter, as follows:

1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members.
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

84. 11 DEP'T STATE BULL. 370 (1944).

The meaning of *procedural matters* could not have been misunderstood by any of the three parties at Yalta, or by China when she agreed to the voting formula a few days later. In Anglo-American and most other legal systems *procedural* refers to the machinery, as distinguished from the principles, of justice, *e. g.*, a forum has before it a procedural matter when considering, say, whether to take jurisdiction of a dispute, or to ask a court's advisory opinion on a legal question connected with it, or refers a question of fact or law to a Special Master, or a question of fact to a jury, or orders a change of venue to another tribunal. Any such action is part of procedure because it does not deal with substantive rights.⁸⁵ In Continental Roman or Civil law and in the Soviet Union the same word *procedure* and its related word *process* are used.⁸⁶

The following circumstances confirm the Soviet Union's concurrence at Yalta in this established meaning of *procedural matters*: For several years preceding December '39 it had been a member of the League, but had not accepted the League's invitation to subscribe to the Statute of the Court.⁸⁷ It had been invited by the Court to become a party to a specific dispute but had declined to do so.⁸⁸ The parties at Yalta agreed that, in accordance with the Dumbarton Oaks Proposals of October '44,⁸⁹ a new organization to maintain peace and security was to be established along the lines of the League Covenant, its court to be constituted under either the League's Statute of the Permanent Court or a new statute based upon it.⁹⁰ The Soviet Union had been represented at Dumbarton Oaks by a delegation of ten under the Chairmanship of Mr. Gromyko.⁹¹ It was thus quite familiar with Chapter III of the Statute of the Permanent Court entitled *Procedure*, which prescribed the old Court's machinery and provided in Article 50: "The Court may, at any time, entrust any individual, body, bureau, commission or other organization that it may select with the task of carrying out an enquiry or giving an expert opinion." Chap-

85. 34 WORDS AND PHRASES 75-79; 21 C.J.S. 33, 266-274; General Investment Co. v. N.Y.C.R.R. Co., 271 U.S. 228 (1926); ENGLISH AND EMPIRE DIGEST 264-9, 374, 446-62, 985-8 (Supp. 1932).

86. *E.g.*, CODE CIVIL ANNOTÉ (Fusier-Herman, 1935-49), and CODE DE PROCÉDURE CIVILE (45th ed. Paris, 1948); NEUNER, PRIVATRECHT AND PROCESSRECHT (Mannheim, 1935); DE PINA, PRINCIPIOS DE DERECHO PROCESAL CIVIL (Mexico D.F., 1940); PERETEVSKU, OCHERKI SOUDOUSTROISTRA I GRAZDANSKOGO PROTSESSA IN OSTRANNYKH GOSUDARST (Outline of Court Organization and Civil Procedure in Foreign Countries) (Moscow, 1938); RICARD, CODE DE PROCÉDURE CIVILE (REVISÉ) DE LA RÉPUBLIQUE CHINOISE (Tientsin, 1936).

87. Hudson, *The Members of The League of Nations*, 16 BRIT. Y. B. OF INT'L L. 130, 144 (1935); HUDSON, *op. cit. supra* note 2, at 127-128, 217, 666-7.

88. Status of Eastern Carelia, P.C.I.J. Sec. B, No. 5 at 7-20 (1923).

89. 12 DEP'T STATE BULL. 368-76 (1945).

90. *Id.* at 370.

91. *Id.* at 174.

ter III of U. N.'s Statute of the International Court carries the same heading and contains the identical Article 50 of its prototype. So the Soviet Union seems to have plainly agreed at Yalta in February '45 that the Council's request for an advisory opinion would be a *procedural matter* under the voting formula. In its later actions at San Francisco, it confirmed the true meaning of the phrase through approval of the Statute, but at the same time (as we shall now see) was attempting to distort that meaning in the voting formula.

In mid-May '45, Committee III/1 (Chairman and Rapporteur, respectively, Greek and El Salvador delegates), created subcommittee III/1/B to clarify the Yalta formula. The subcommittee on May 22 submitted to the sponsoring governments twenty-three categories of matters and asked whether in their opinion these were procedural and thus to be decided by any seven Council votes or were non-procedural and subject to veto by one permanent Member. One question was: Is a request to the Court for an advisory opinion a procedural matter? ⁹² On June 7 the five sponsoring governments (then including France) issued a Statement on interpreting proposed Article 27 (the Yalta voting formula). ^{93a} It did not answer the subcommittee's question just mentioned. It stated ^{93b} that the Council's decisions are non-procedural and subject to veto by one permanent Member if they "involve its taking direct measures under Chapter VIII (of the Dumbarton Oaks Proposals) all the way from mediatory adjustment of a situation that might lead to a dispute to a decision that there is a threat to the peace or that force shall be used to suppress a breach of the peace. The Statement ^{93c} pointed out in effect that some kinds of Council action which might ordinarily be regarded as procedural, such as deciding to investigate or sending a commission of inquiry, could "initiate a chain of events" leading to major political consequences and should therefore be regarded as non-procedural and subject to the veto; that *accordingly procedural matters* which any seven Council Members can decide *should be confined* to decisions under Chapter IV, Section D, of the Dumbarton Oaks Proposals, *specifically*: matters concerning the Council's rules of procedure; its method for selecting its President; its rules for functioning; its times and places of meetings; by what agencies its functions shall be performed; and its invitation to interested Members or any other State to participate in discussions; and that (part II, paragraph

92. 9 U.N. CONF. DOC. 699-709 (1945).

93a. 6 *Id.* at 710-14. This is reproduced with a helpful discussion in GOODRICH AND HAMBRÖ, *op. cit. supra* note 1, at 210-15; Lee, *The Genesis of the Veto*, 1 INTERNATIONAL ORGANIZATION 33-42 (1947).

93b. 6 U.N. CONF. DOC. 710 (1945), Part I, paragraph 1.

93c. *Id.* at paragraphs 4 and 5.

2) even the question whether a matter is procedural could not be brought up for a vote in the Council over the objection of one permanent Member. This definition would leave the Council's request to the Court a non-procedural matter subject to the unitary veto.

Russia forced the Statement on its four co-sponsors. Secretary of State Stettinius took the extreme step of going over the head of Mr. Molotov, Chief of the Soviet Union's delegation, to have Presidential Representative Hopkins in Moscow appeal personally to Stalin to relax the Russian delegation's demands.⁹⁴ Later, in Part IV, we can see whether U. S. S. R. has lived up to its assurance in paragraph 8 of the Statement: "It is not to be assumed, however, that the permanent members, any more than the non-permanent members, would use their 'veto' power wilfully to obstruct the operation of the Council."

The Statement was never approved by any subcommittee, committee, or commission, or by the Conference itself.⁹⁵ The Soviet Union has admitted that it binds only the five sponsoring powers.⁹⁶ Yet in the U. N. Security Council the Soviet Union, relying on that Statement, has since at will paralyzed any effective action on most matters, including any proposal that it refer a legal question to the Court. Indeed a mere intimation that Russia would oppose such a proposal has on more than one occasion prevented any motion for such reference as a futile gesture.⁹⁷

We have now seen the main San Francisco Conference actions relevant to this discussion: actions in which the Soviet bloc appears as the main force aimed at excluding international law as a criterion and the International Court as U. N.'s adviser; and proposals by the Big Five, on pressure from Russia, but never adopted by the Conference, for distorting the plain meaning of *procedural matters* in order to enable one permanent Member of the Security Council to prevent most kinds of procedural action including a request to the Court for advice. We can now look at some of the situations and disputes since handled in both political organs of U. N. in which those attempted exclusions and distorted meanings have been used to thwart the real purposes of the Charter.

94. In this way Mr. Molotov's reluctant consent was obtained to according procedural status to the question of placing a matter on the council's agenda, see STUART, THE DEPARTMENT OF STATE, c. 33 (1949). Mr. Stuart refers to an essentially similar account by James F. Byrnes in SPEAKING FRANKLY, 64-5 (1947).

95. See GOODRICH AND HAMBRO, *op. cit. supra* note 1, at 220. The authors say it was made clear during the discussion that this course of avoiding any vote or other action on the statement was deliberately followed in order not to have Members of the Conference other than the sponsoring powers feel bound by the expression of the latter's views.

96. See Padelford, *The Use of the Veto*, II INTERNATIONAL ORGANIZATION 227 (1948).

97. See for instance text *infra*, at note 113 *et seq.*

IV. SAN FRANCISCO MOVES TO LAKE SUCCESS

Naturally the dominant men and ideas of San Francisco carried over to Lake Success. Neither U. N.'s Security Council nor its Assembly, nor any other organ or subordinate agency, has yet asked the Court for advice in a situation where peace was threatened or remotely involved.⁹⁸

Legal questions raised in the Security Council where situations could endanger peace have had to do chiefly with the issue of domestic jurisdiction. Of the dozen or so important cases of that kind in the Council,⁹⁹ the following selected ones reflect the inevitably mounting disorder when political bodies reject the steadying touch of legal principle:

(a) In the Spanish situation, brought to the Council in April '46 on motion of the Polish delegate, there were proposals for drastic action. The proponents argued that although the Franco regime's acts were domestic, the Council's action was called for by their potential threat to international peace. The Soviet Union insisted that the proposals were inadequate; that the threat to peace was actual; and that the Council order its Members to terminate relations with Spain. The Council withheld action.¹⁰⁰

(b) In December '46 in the Greek appeal against guerrilla action by Bulgaria, Albania and Yugoslavia, the Council's Committee reported that actual threat to international peace neutralized the domestic jurisdiction obstacle which the Soviet bloc had urged as a bar to action by the Council. A resolution offered by the U. S. A. delegation for giving effect to the Committee's report received 9 votes for to 2 against, which latter included that of the Soviet Union; so the resolution was ruled as lost under Article 27's unitary veto.¹⁰¹

(c) In the Indonesian matter the Netherlands Government repeatedly raised the issue of domestic jurisdiction and asked that the question of the Security Council's competence be referred to the Court for an advisory opinion. The Soviet Union through Mr. Manuilsky

98. The Assembly's Oct. 22, 1949 decision (see text *supra*, at notes 6-7) is no exception, as the Mindszenty and other trials in Hungary, Bulgaria and Rumania did not threaten or involve international peace; GOODRICH AND HAMBRO, *op. cit. supra* note 1, at 68. An illuminating discussion, covering more developments in U.N. political organs than are dealt with below is Goodrich, *The United Nations and Domestic Jurisdiction*, III INTERNATIONAL ORGANIZATION 14 (1949).

99. An informative account covering some early instances perforce omitted from this condensed review is Professor Padelford's *The Use of the Veto*, *supra* note 96.

100. Journal of the Security Council, Nos. 28, 29, 37, 39, 40 (1946); also GOODRICH AND HAMBRO, *op. cit. supra* note 1, at 60.

101. Journal of the Security Council, No. 25 at 563 *et seq.* (1946); also text and citations in GOODRICH AND HAMBRO, *op. cit. supra* note 1, at 60-1.

had originally brought Indonesian matters before the Council in '46 when British troops were in Java at the request of the Netherlands. The U. K. through Mr. Bevin had then offered the domestic Jurisdiction plea, which was vigorously attacked by the Soviet representative.¹⁰² The matter was dropped in February '46. The later Security Council phase of the Indonesian problem was brought on in July '47 by Australian and Indian appeals. As in '46, the Soviet bloc led the opposition to referring the domestic jurisdiction issue to the Court. The request for such reference, although supported by the U. S. A., U. K., France and Belgium, was voted down in 1947.¹⁰³ The Council's subsequent actions assumed its own competence without a vote.

As will be recalled, Mr. Evatt at San Francisco had warned the Conference that if the Charter should enable a threat to peace to override a State's domestic jurisdiction safeguard, this would be "almost an invitation to use or threaten force in any dispute arising out of a matter of domestic jurisdiction in the hope of inducing the Security Council to extort concessions from the State that is threatened."¹⁰⁴ Mr. Evatt was not far wrong. When the crucial meetings of the Security Council for dealing with the Netherlands plea of domestic jurisdiction had been set for late January '49, a conference of nineteen Asiatic nations was summoned by India at New Delhi for January 20.¹⁰⁵ Some of those attending were official representatives to U. N. The January 23 resolutions of the New Delhi Conference, cabled to Lake Success in time to give the decisive blow to the Netherlands plea of domestic jurisdiction, declared emphatically that continued hostilities in Indonesia endangered the peace of Southeast Asia, and then dictated a set of terms which the Security Council should put into effect.¹⁰⁶ These resolutions reached the pages of the metropolitan press directly from New Delhi. Concurrent press interviews by Asiatic leaders emanating from New Delhi expansively suggested that the conference was a demonstration of Asia's solid opposition to "colonialism" in general and might be the forerunner of collective or bloc action by Asia against the West.¹⁰⁷ The New Delhi resolutions, perfectly timed, dominated the subsequent and final debate and action in the Security Council, which ignored—this time under the leadership of U. S. A. and U. K. delegates—the Dutch plea that the legal question of the

102. Journal of the Security Council, No. 11 at 197 (1946); GOODRICH AND HAMBRO, *op. cit. supra* note 1, at 59.

103. Journal of the Security Council, No. 67 at 1645 (1946).

104. See note 37 *supra*.

105. N.Y. Times, Jan. 16, 1949, § 4, p. E5, col. 9; N.Y. Herald Tribune, Jan. 20, 1949, p. 14, col. 2.

106. N.Y. Times, Jan. 24, 1949, p. 3, col. 2 (full text).

107. *Id.* at 1.

Council's competence be referred to the Court. On the stated ground of international friction and threats to peace, the Council adopted resolutions of an unprecedented severity, including some of the New Delhi formula, directed toward compelling the Dutch to concede vital native demands.¹⁰⁸ The Dutch who for at least thirty years had been building toward dominion government in the East Indies, and had through the Queen in December '42 pledged it publicly to the natives,¹⁰⁹ were thus forced, at a new disadvantage, into negotiations with the native revolutionary movement, whose long-standing alliance with Communism, mentioned by the Dutch in earlier debates, had been again described in the Council by the Netherlands Ambassador, Dr. van Royen. The sequent negotiations between the Dutch and the native Republican organization have since resulted in agreement on a plan for the United States of Indonesia far more prejudicial to the Dutch than was contemplated by the 1948 Renville Agreement which a U. N. commission had formulated and promoted.¹¹⁰

While those delicate negotiations under chaperonage of the Security Council's Commission were proceeding in Batavia (to be later continued in the Hague), the Soviet Union bloc started a movement to open up the entire Indonesian question in the General Assembly. In the *ad hoc* committee handling the matter, the vote on May 10, '49 was 42 (including that of the U. S. A.) to 6 for deferring in the Assembly any further consideration of the Indonesian question pending those negotiations. The six votes against the resolution were all cast by the Soviet bloc.¹¹¹ Next day in the General Assembly the *ad hoc* committee's report and resolution were up for action. There was the same line-up of forces. The U. S. A. again urged deferment. Ambassador Austin, its Chief Delegate, answering attacks from the Soviet bloc, said in part: "The Soviet group of States has never paid more than lip service to the principles of the United Nations in connexion with the Indonesian question. From the very beginning they have acted in such a way as to bring about political and economic disorder in Indonesia. . . . Does the Soviet Union want an independent Indonesia? Its conduct indicates that it wants an Indonesia under the

108. S/PV 406, Jan. 28, 1949.

109. FURNIVALL, NETHERLANDS INDIA, Ch. VIII, IX (1944). For Queen Wilhelmina's Pledge, *The Political Events in the Republic of Indonesia*, NETHERLANDS INFORMATION BUREAU 38 (Oct. 1947).

110. See, for Ambassador van Royen's account of communist activity in East Indies, Journal of the Security Council, Third Year, No. 132 at 7-21. For Renville Agreement of Jan. 17, 1948, Security Council Doc. S/649; for United States of Indonesia agreements of Nov. 2, 1949, see Commission's Special Report (in general terms) to Security Council Nos. 10, 1949, S/1417; also official Security Council Docs. giving full terms: *Appendices to the Special Report*, etc. S/147/Add. 1 (Nov. 14, 1949).

111. A/AC, May 10 '49, 24/SR 52.

domination and control of a Communist authority taking its orders from Moscow." The resolution for approval of the *ad hoc* committee's report and for deferment by the Assembly of further consideration of the Indonesian matter was adopted by 37 votes, with 14 abstentions.¹¹²

(d) Even this study of documents has its lighter moments. The Czechoslovak question was raised in the Security Council in March '48 at the complaint of Chile on the ground that the Soviet Union by its Prague coup had violated Czechoslovak political sovereignty and independence in contravention of the Charter's Article 2, paragraph 7.¹¹³ The Soviet Union, opposing any action by the Council, declared that the matter was one of domestic jurisdiction, since a change in government is a domestic matter even when brought about through action of a foreign power.¹¹⁴ This rendering of the domestic affairs concept was surely an original contribution. According to the minutes, the U. S. A.'s proposal in the Council to appoint a committee to take evidence and report on what had happened in Czechoslovakia was then smothered by the announcement of "a permanent member" that it would vote against it.

So much for the Security Council. The unitary veto is confined to the Council; it does not apply to voting in the General Assembly, in the Economic and Social Council, or other political U. N. bodies and agencies. In the Assembly, States have, in ten or so notable instances, moved for its requesting the Court's opinion. A few are of special interest.

(a) India's complaint about discriminatory practices against residents of Indian origin in the Union of South Africa has been pending in the Assembly since '46. In December '46, the Assembly voted down South Africa's request that the question of the Assembly's competence in South Africa's domestic affairs be referred to the International Court. In the debate the Soviet delegates were the chief supporters of the Indians. The Assembly avoided any express decision on its own competence, but its subsequent resolutions have assumed its authority to act. In one it took the position that a State's treatment of its nationals is not necessarily within its domestic jurisdiction if friendly relations between States are impaired.¹¹⁵ On May 14, '49 the Assembly invited India, Pakistan and the Union of South Africa to a round-table conference,¹¹⁶ but has not since taken any conclusive action.

112. A/PV 208, May 11, 1949, at 17, 71-5.

113. S/PV 272, March 22, 1948; S/PV 276, March 31, 1948; S/PV 278, April 6, 1948; also GOODRICH AND HAMBRO, *op. cit. supra* note 1, at 64.

114. Mr. Gromyko, for U.S.S.R., and Mr. Tarasenko, for Ukrainian S.S.R. S/PV 268, March 17, 1948, at 11-13, and 36-40.

115. First Session, Doc. A/64/Add. 1.

116. A/900, May 31, 1949, at 6.

(b) In the Korean matter pending in the Assembly since '46-'47, the Soviet Union (dominant in Northern Korea) contested, on the score of domestic jurisdiction, the Assembly's competence to observe elections through a commission. The resolution to do this was carried, but the Soviet Union physically blocked the Commission's efforts in Northern Korea.¹¹⁷

(c) At the request of Chile in May '48 the General Assembly considered the action of the Soviet Union in preventing Russian wives of foreign nationals from leaving the country. It was claimed that this constituted a violation of fundamental human rights and other principles of the Charter. The Soviet Union representative in June '48 declared, among other things, that to place the question on the Assembly's agenda would constitute a violation of the domestic jurisdiction paragraph of the Charter. The Assembly's Sixth Committee rejected the proposal to ask the International Court's advisory opinion on the legal question so raised; and then, assuming the Assembly's competence, it submitted to it a draft resolution declaring that the Soviet Union's measures were contrary to the Charter, etc., and recommending that the Soviet Union withdraw them. The Assembly adopted the draft resolution April 25, '49.¹¹⁸ The matter is still pending.

(d) Bolivia in March '49 proposed that the criminal court proceedings of Hungary against Cardinal Mindszenty and of Bulgaria against other ecclesiastical persons be placed on the General Assembly's agenda. Hungary and Bulgaria, strongly supported by the Soviet Union, promptly objected on the score of domestic jurisdiction. Seconders of Bolivia's proposal answered that in the peace treaties of the victorious Allied and Associated powers with all three Balkan States, the pledges of the latter to preserve human rights and fundamental freedoms must transcend any domestic character of the acts complained of. On April 30, '49, following several turbulent sessions both in the Assembly and in its *ad hoc* political committee, the Assembly adopted a resolution placing the matter upon its agenda for its fourth session. Subsequently Rumania's action in court proceedings was joined with those of Hungary and Bulgaria on the Assembly's agenda. On October 22, '49 the Assembly voted to request the International Court for an advisory opinion on some legal issues involved.¹¹⁹

117. For resolution, Second Session, Doc. A/519; and for summary, GOODRICH AND HAMBRO, *op. cit. supra* note 1, at 170-1.

118. A/842, April 25, 1949.

119. See for action on resolution, A/PV 203, April 30, 1949; for joinder, recital in Assembly's Oct. 22, 1949, Resolution, Doc. A/1043; for documentation of Assembly's Request, see note 7 *supra*.

The Assembly's resolution recites that the Charter's purpose under Article 55 is to promote universal observance of human rights and fundamental freedoms, that the three defeated States have rejected charges of treaty violations, and that they have refused to join in appointing commissions for settling disputes pursuant to the treaties; that under the treaties such refusal would authorize U. N.'s Secretary General on a party's request to appoint a third member to such a treaty commission, if the other party fails to agree upon him; and that it is important for the Secretary General to have advice on the scope of his authority. The resolution then recites the Assembly's decision to ask the Court, *first*, do the diplomatic exchanges between parties to the treaties disclose disputes subject to provisions for settlement of disputes under those treaties; *second*, are the three States obligated to appoint representatives to the treaty commissions; *third*, if so, and if one does not appoint such a representative, has the Secretary General authority to appoint him; and *fourth*, would a commission so constituted be competent to make a binding decision? The application to the Court, registered Nov. 9, '49, is strictly within the terms of the resolution.¹²⁰

So far as its resolution and its formal request to the Court go, the Assembly's competence to deal with any aspect of the disputes is not brought into issue, but the diplomatic correspondence when filed and answering pleadings, if any, could broaden the issues and present the question of domestic jurisdiction. Thus the new Court might have occasion to deal for the first time with the impact of treaty obligations upon matters primarily domestic. Charter obligations could not be involved on this point unless on the possible ground (analogous to the "piercing of the corporate veil" between holding companies and their subsidiaries) that, although the three States are not members of U. N., they are to be held to the Charter since the Soviet Union, a member, controls them. If the Court's opinion should deal with the domestic jurisdiction issue, this would, for reasons presently given, hardly affect the handling of that issue in some later possible case in the Security Council. In connection with that issue, the Court might appraise the effect, if any, of the San Francisco proceedings upon interpretation of the Charter's Article 2, paragraph 7. It seems that such an appraisal would almost certainly affect subsequent action in the Assembly, but that any reaction in the council could be delayed indefinitely.

120. C.I.J. General List No. 8.

V. THE COURT AND U. N.'s FUTURE

This brings us to a new question about the use of the San Francisco preparatory work by the International Court in construing the Charter, whether in the Bulgaria-Hungary-Rumania case or in some other. In the light of precedent in the Permanent Court and generally in Anglo-American and Continental jurisprudence, the preparatory work would be admitted in evidence.¹²¹ But would it be allowed to have weight? Would it even be used? The whole rationale of using *travaux préparatoires* when searching for the intention of doubtful language in a treaty or statute rests on the premise that, although the interests of the framers may have been at odds, all intended the document to express a common denominator of purpose. Would the Court allow committee decisions at San Francisco to affect the plain meanings of the Charter's words if it should be demonstrated that the decisions had been forced mainly by the Soviet Union, whose aim and strategy have been to exploit the Charter for undermining and destroying that very international peace which is its goal, and for facilitating the destruction of other U. N. States? Would not the Court be compelled to interpret the Charter's words according to their established meanings and in terms of its declared purposes, and to ignore Conference decisions and interpretations inconsistent with them when traceable to such hostile strategy?

Another point on the use of *travaux préparatoires*: We saw that a court, when interpreting a treaty, can consider in evidence the conduct of political officers subsequent to its execution.¹²² Would not such precedents sanction the admission in evidence of the Soviet Union's actions in U. N. political organs which confirm its fixed purpose and strategy as officially announced and as pursued at San Francisco?

But aside from the use or effect of *travaux préparatoires* for better or for worse, with such a record of futility in the U. N. as an agency for world order, what is the prospect? What inherent chance is there that a cure could develop within the organization itself? Could it come from the Security Council? The great majority of U. N. States are quite free to disregard the June 7, '45 Statement by the sponsoring powers at San Francisco on the meaning of *procedural matters* in the Charter's Article 27. But as long as the Soviet Union remains in U. N., and as long as the U. S. A. and U. K. treat the Statement as binding upon them, how could the Court ever have an opportunity to interpret the phrase and so perhaps to break the Council's isolation

121. See pp. 297-8 *supra*.122. See note 45 *supra* and text.

from the Court? Some day a request by the Assembly for an advisory opinion might be so framed as to give the Court an opportunity to interpret *procedural matters* in Article 27. If the Court possessed the constructive boldness of Chief Justice Marshall and his colleagues in *Marbury v. Madison*, and seized its slender opportunity as they did, its opinion might have at least the effect of freeing the U. S. A. and U. K. from any sense of obligation (if they should then still feel it), created by their concurrence in the joint June 7, '45 Statement of the sponsoring powers on the meaning of *procedural matters*. A political solution might then be hoped for. But the winding road among contingencies is dark and probably impassable.

It remains for us to consider in general whether action in the Council can come to be affected by advisory opinions given to the Assembly. Suppose that the domestic jurisdiction question is dealt with by the Court in the advisory proceedings concerning the Mindszenty trial, or Southwest Africa's status, or in some other: could this in turn affect action of the Council as now constituted in situations that present such a question? The possibility seems remote. *First*, Article 59 of the Statute provides that the Court's decision even in a contentious case "has no binding force except between the parties and in respect of that particular case"; and Article 68 directs that the Court shall be guided in its advisory functions by applicable provisions as to contentious cases. *Secondly*, an advisory opinion can under the Charter be disregarded even by the political organ that receives it.¹²³ *Thirdly*, the Soviet Union (or any other permanent Member) could legally, under the plain meaning of Article 27, paralyze by veto any proposal for the Council's non-procedural action, be it a call to Members for cooperation in armed force or in economic boycott, or an order, or a recommendation, or even a mere finding that a situation presents the likelihood of international friction.

No relief from the U. N.'s ordeal can be had through amending the Charter, for Article 108 enables any permanent Member alone to veto a proposed amendment. As matters stand, no cure seems available within the framework of the Charter's Article 27 and the five-Power Statement together, or even within that of the former alone. By contriving exclusion, wholly of the Court, and largely of the Council, from any effective function for reducing international friction, the Soviet Union seems so to have frustrated the United Nations Organization, as now constituted and controlled, that nothing can arrest its rapid degeneration.

123. See HUDSON, *op. cit. supra* note 2 at 511-3.